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Hanspeter Walter
Bradley N. Webb
Rachelle M. Weed
Brent W. Westcott
Adam Wijemanne
Laura Winterberger
Elaine Won
Armin G. Yazdi

LEGISLATIVE
COUNSEL
BUREAU

LEGISLATIVE COUNSEL BUREAU
925 L STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 341-8000
FACSIMILE (916) 341-8020
INTERNET WWW.LEGISLATIVECOUNSEL.CA.GOV

May 11, 2020

Honorable Brian Jones
Room 4088, State Capitol

LEGISLATURE: REMOTE VOTING - #2011147

Dear Senator Jones:

You have asked us to address whether Members of the Legislature may participate and vote in legislative proceedings, including floor sessions and committee hearings, by means of remote access.¹

1. Background

This question arises in the context of the ongoing COVID-19 pandemic, which has greatly affected governmental operations and impeded the Legislature's conduct of the people's business. While we need not provide a comprehensive summary of recent events, we note the following facts.

Responding to the COVID-19 pandemic, Governor Newsom declared a state of emergency in California on March 4, 2020.² The Governor issued a subsequent executive order on March 12, 2020, which in relevant part waived portions of the state and local open meetings laws applicable to state executive branch agencies and local government agencies.³ During the week of March 15, 2020, various California counties issued stay-at-home or shelter-in-place

¹ For purposes of this opinion, we assume that the means of remote access would allow Members to participate in proceedings simultaneously (i.e., not through serial polling).

² See Office of Governor Gavin Newsom press release dated March 4, 2020, available at <<https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>> (last accessed April 29, 2020). President Trump proclaimed a national emergency on March 13, 2020. (Pres. Proc. No. 9994, 85 Fed.Reg. 15337 (March 18, 2020).)

³ Governor's Exec. Order No. N-25-20 (March 12, 2020). This order was modified by Governor's Exec. Order No. N-29-20 (March 17, 2020).

orders; the Governor issued a statewide order on March 19, 2020.⁴ Meanwhile, the Senate amended its rules on March 16, 2020, to allow for remote legislating only during the state of emergency.⁵

2. Analysis

2.1 Article IV's general constitutional scheme

Virtually all provisions of article IV of the California Constitution (hereafter article IV) assume that the Legislature will act by means of physically convening Members in the same place at the same time. For example, the Legislature is constitutionally required to convene, and to adjourn the session sine die, on particular dates.⁶ Similarly, a majority of the membership of each house constitutes a quorum, but a smaller number may “compel the attendance” of absent Members, and a rollcall is required if requested by “3 members present.”⁷

Relatedly, the Constitution prohibits either house of the Legislature from recessing “to any other place” without consent of the other house.⁸ This prohibition, as it originally appeared in the Constitution, also encompassed the notion that the Legislature “sits” in a particular location. Specifically, the clause “other than that in which they may be sitting” originally followed that prohibition.⁹ The intent behind deleting the latter clause was to make a nonsubstantive change for concision.¹⁰ Thus, even absent that clause, the prohibition implicitly contemplates that the Members be present and “sitting” in a particular location during the legislative session.

Words and phrases used in case law similarly connote physical presence. The California courts have long referred to the houses of the Legislature as a “legislative assembly.”¹¹ In this regard, the term “assembly” means a company of persons “collected together in one place,” usually for some common purpose, such as deliberation and legislation.¹²

⁴ See AP News website, San Francisco Bay Area counties issue shelter-in-place order, available at <<https://apnews.com/a342998638cdccb56172a1663e8d6edf>> (last accessed April 29, 2020); Governor's Exec. Order No. N-33-20 (March 19, 2020).

⁵ Sen. Res. No. 86 (2019-2020 Reg. Sess.) (adding Senate Rule 56).

⁶ Cal. Const., art. IV, § 3, subd. (a).

⁷ Cal. Const., art. IV, § 7, subds. (a), (b).

⁸ Cal. Const., art. IV, § 7, subd. (d).

⁹ This clause dates back to the 1849 California Constitution and was omitted in a revision suggested by the California Constitution Revision Commission as Proposition 1-a, approved by the voters at the November 8, 1966, statewide general election. (See Ballot Pamp., Gen. Elec. (Nov. 8, 1966).)

¹⁰ In making this revision, the commission commented that it represented a change in phraseology only. (See Cal. Const. Revision Com., Proposed Revision (1966) pp. 32-33.)

¹¹ See, e.g., *Ex parte McCarthy* (1866) 29 Cal. 395.

¹² Webster's Online Dict., available at <<https://unabridged.merriam-webster.com/unabridged/assembly>> (last accessed April 29, 2020).

Moreover, the implicit constitutional principle of physical attendance by the Members infuses the statutes and parliamentary rules the Legislature has adopted to govern its proceedings, reflecting the Legislature's own historical understanding that its Members are constitutionally required to convene in person in order to take action on legislation. Thus, for example, by statute the Legislature has defined a legislative meeting that is required to be open and public as "a gathering of a quorum of the members of a house or committee in one place for the purpose of discussing" legislative business.¹³ The Government Code further prescribes that the Sergeant-at-Arms of the Senate and of the Assembly have "general supervision of the Senate and Assembly chambers, and the rooms attached" and that they are required to "[a]ttend during the sittings of their respective bodies."¹⁴ Both the Assembly and Senate Rules refer to Members "present" or "present and voting,"¹⁵ as well as to bills being "placed" on the desks of Members, the latter reference assuming the physical presence of Members who sit at those desks.¹⁶ In addition, the Assembly Rules require all standing committees and subcommittees to "meet at the hour and place" specified.¹⁷ In this way, these rules clearly assume the physical presence of the Members.

It is well settled that to ascertain the meaning of a provision, the words and phrases employed are first examined, and that these words and phrases are given their plain and ordinary meaning.¹⁸ These rules apply to constitutional provisions as well as to statutes.¹⁹ As discussed above, the language of article IV provides that the Legislature shall "convene" in one place. The word "convene," found in section 3 of article IV, means to come together, meet, or assemble in a group or body for some specific purpose.²⁰ Thus, the meaning of convene includes the element of being physically present.

This common understanding of the meaning of "convene" and other related phrases is widely embraced. As set forth above, the words used in case law and the legislative rules also connote physical presence. Additionally, courts from other states have construed similar words to conclude that physical presence is required to establish a quorum or otherwise to conduct

¹³ Gov. Code, § 9027. All further statutory references are to the Government Code unless otherwise indicated. See also Assem. Rule 11.3 & Sen. Rule 2 (generally referring to the presence of a quorum). All references to the house rules are to the standing rules in effect for the 2019-2020 regular session.

¹⁴ § 9194.

¹⁵ See, e.g., Assem. Rules 100 & 101; Sen. Rules 21.7 & 42.

¹⁶ See, e.g., Assem. Rule 47; Sen. Rule 29.5.

¹⁷ Assem. Rule 56.

¹⁸ *People v. Knowles* (1950) 35 Cal.2d 175, 182; *In re Alpine* (1928) 203 Cal. 731, 737.

¹⁹ *Winchester v. Mabury* (1898) 122 Cal. 522, 527.

²⁰ Webster's Online Dict., available at <<https://unabridged.merriam-webster.com/unabridged/convene>> (last accessed April 29, 2020).

legislative business.²¹ In sum, the words and phrases used to describe the operations of each house of the Legislature, taken together, categorically contemplate a body of individuals who personally meet in one place for the purpose of deliberating and legislating.

Not only does remote legislating contradict the common understanding of the words used in the Constitution and elsewhere, but it runs counter to how deliberative bodies have historically been understood to operate. For example, it has long been a tenet of conventional parliamentary practice that “[i]n a legislative body, it is a rule that no member can vote who is not present when the question is put.”²² Moreover, the legislative process is inherently dependent on the natural give-and-take of debate. Interpersonal interactions greatly influence this process of deliberating and legislating. These in-person interactions have traditionally been an integral part of the legislative process, and the nature and scope of those interactions are fundamentally altered if Members of the body are not physically present.

Furthermore it is our view that the same constitutional constraints apply to legislative committees. A committee is an instrument of the body that appoints it and functions in an advisory capacity. The action of a committee, generally speaking, is in effect a recommendation to the entire house, subject to the approval of that house.²³ Consequently, the physical presence requirements that are inherent in the constitutional duties of Members with respect to floor proceedings of the Senate and Assembly are equally applicable to the proceedings of legislative committees when acting on legislation.

2.2 Article IV’s “open and public” meeting requirement

Article IV, section 7, subdivision (c) requires, with limited exceptions, that the proceedings of the houses of the Legislature, including those of committees, be “open and public.” As further implemented by statute,²⁴ these open meeting requirements also contemplate the

²¹ See, e.g., *Fagnoli v. Cianci* (1979) 121 R.I. 153, 168 [397 A.2d 68, 76] (standing in chamber doorway not sufficiently “present” for purposes of establishing a quorum); *Roanoke City School Bd. v. Times-World Corp.* (1983) 226 Va. 185, 192-193 [307 S.E.2d 256, 259] (“meeting” defined to include “sitting,” which connotes physical presence); *State ex rel. Stephan v. Board of County Com’rs of Seward County* (1994) 254 Kan. 446, 450 [866 P.2d 1024, 1027] (“meeting” statutorily defined as a “prearranged gathering or assembly,” which requires a physical gathering). But see *Tuzeer v. Yim, LLC* (2011) 201 Md.App. 443, 469 [29 A.3d 1019, 1034] (terms “present” and “convene” can encompass participation through the use of technology”).

²² Mason’s Manual of Legislative Procedure (2010 ed.) § 538.

²³ Mason’s Manual of Legislative Procedure (2010 ed.) § 615.

²⁴ Section 9027 further implements this constitutional requirement, providing in relevant part:

“Except as otherwise provided in this article, all meetings of a house of the Legislature or a committee thereof shall be open and public, and all persons shall be permitted to attend the meetings. As used in this article, ‘meeting’ means a

(continued . . .)

Legislature assembling in a specific, physical space. Specifically, section 9027 provides that all people shall be permitted to “attend” legislative meetings. The usual, ordinary meaning of “attend” is “to be present at.”²⁵ The clear import of “attend” is physical presence.

With respect to the house rules, the Assembly and Senate Rules require a rollcall vote to dispose of legislative business, and these requirements are consistent with, and in furtherance of, the open and public meeting requirement.²⁶ In addition, the Assembly Rules require that committee hearings “shall convene in an area that is readily accessible to the public”²⁷ and prohibit the exclusion of the public, who must have “access to public legislative meeting and hearing spaces.”²⁸

It may be argued that the Legislature can satisfy the “open and public” requirement solely by streaming or otherwise broadcasting its proceedings. However, we know of no authority for the proposition that this manner of viewing is equivalent to physical presence. Among other constraints, providing access only by streaming or broadcasting necessarily limits the public’s perceptions of the proceedings based on editorial or production decisions made by the persons operating the system of devices that are capturing the event, with the result that a third party would effectively be controlling and framing the information that the public receives.

It is our view that remote legislative sessions that are conducted without a physical location for members of the public to observe them would undercut the purposes of the open meeting requirements—namely, to secure a transparent democracy by ensuring that the public is informed of the conduct of the people’s business and allowing the public to monitor Members and to influence their decisions by public testimony and presence.²⁹ Therefore, to the extent that virtual legislative sessions necessarily permit Members to be located in different physical places to

(... continued)

gathering of a quorum of the members of a house or committee in one place for the purpose of discussing legislative or other official matters within the jurisdiction of the house or committee.”

²⁵ Webster’s Online Dict., available at <<https://unabridged.merriam-webster.com/unabridged/attend>> (last accessed April 29, 2020).

²⁶ The Assembly Rules require “[e]very Member in the Assembly Chamber” to record the Member’s vote during a rollcall. (Assem. Rule 104.) The Senate Rules also require “[v]oting on the disposition of bills, constitutional amendments, concurrent resolutions, and joint resolutions by committees [to] be by rollcall vote only.” (Sen. Rule 28.7.)

²⁷ Assem. Rule 56.

²⁸ Assem. Rule 25.

²⁹ See *ACT-UP v. Walp* (M.D. Pa. 1991) 755 F.Supp. 1281, 1288 (Members of the public attend legislative meetings to let their legislators know that “they are being watched, that their decisions are being scrutinized, and that they may not act with impunity outside the watchful eyes of their constituents”).

which members of the public lack access, legislating remotely arguably violates the constitutional guarantee of open and public meetings.

2.3 Proposition 54

As an extension of the traditional constitutional open meeting requirement described above, Proposition 54, an initiative measure approved by the voters at the November 8, 2016, statewide general election (hereafter Proposition 54), amended article IV, section 7 to include the additional right to record legislative proceedings, as follows:

“Except as provided in paragraph (3), the proceedings of each house and the committees thereof shall be open and public. The right to attend open and public proceedings includes the right of any person to record by audio or video means any and all parts of the proceedings and to broadcast or otherwise transmit them; provided that the Legislature may adopt reasonable rules pursuant to paragraph (5) regulating the placement and use of the equipment for recording or broadcasting the proceedings for the sole purpose of minimizing disruption of the proceedings. Any aggrieved party shall have standing to challenge said rules in an action for declaratory and injunctive relief, and the Legislature shall have the burden of demonstrating that the rule is reasonable.”³⁰

Thus, Proposition 54 “guarantee[s] the right of all persons, including members of the press, to freely record legislative proceedings and to broadcast, post, or otherwise transmit those recordings.”³¹ The intent of that requirement is “to foster disclosure, deliberation, debate, and decorum in our legislative proceedings, to keep our citizens fully informed, and to ensure that legislative proceedings are conducted fairly and openly.”³² The public’s right to record applies to “any and all parts” of a legislative proceeding. This right is separate from, and in addition to, any requirement that the Legislature provide audiovisual recordings of its proceedings.³³

In order to record and broadcast the proceedings, the public may bring their own equipment, subject to specified placement and use rules. That provision implies that the public will have direct access to the actual physical space in which the legislative proceedings are taking place. Accordingly, members of the public have the constitutional right to attend an open and public legislative proceeding at the location where the proceeding is taking place, and to personally record and broadcast any and all parts of the proceeding with their own equipment. The grant of that right contemplates that the proceeding will occur in a single place at which the Members are physically present, and that members of the public will have access to the place where Members are meeting in order to observe and record with their own equipment any and all parts of the

³⁰ Art. IV, sec. 7, subd. (c)(1).

³¹ Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Prop. 54, § 2, subd. (f), p. 125.

³² Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Prop. 54, § 2, subd. (f), p. 125.

³³ See, e.g., Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Prop. 54, § 2, subd. (g), p. 125.

proceeding. Thus, remote proceedings would potentially violate Proposition 54 insofar as there would be no place the public could go to directly observe and record the proceedings.

2.4 Counterarguments

Although it is our view that the California Constitution contemplates that Members of the Legislature will meet in the physical presence of one another, arguments can be made that meeting by remote access would be constitutional if used on a temporary emergency basis, such as during the pendency of the COVID-19 pandemic. In that context, a decision by the Legislature to conduct business by remote access could be upheld by a court based upon the principle of separation of powers. That principle underlies the judiciary’s deference toward the Legislature as to whether the Legislature has complied with the formalities of enacting legislation.³⁴ Similarly, a court may defer to the Legislature’s judgment regarding the place of its meeting in a time of emergency.

There is historical precedent for this proposition. In 1862, Sacramento was flooded, and the Legislature passed a resolution to move its proceedings to San Francisco temporarily.³⁵ Unable to get a court ruling authorizing the move, the Legislature invited the state Attorney General to opine on its constitutionality.³⁶ The Attorney General found the move to be constitutional, forcefully arguing in favor of deference to the Legislature in this matter:

“That the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States.’ [¶] . . . [¶] There is no provision in the Constitution declaring it necessary for the Legislature to meet at any given *place* . . . [¶] . . . [¶] Section 15, Article IV of the Constitution thus reads: ‘Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than to that in which they may be sitting.’³⁷ . . . [G]iving [this language] an affirmative rendition, [this means] that the Legislature may, with the concurrence of both Houses, adjourn . . . to any other place than that in which they may be sitting.

“[¶] . . . [¶]

“[I]n view of the absence of any provision of the Constitution inhibiting a legislative removal, or any law declaring that the Legislature shall hold its session at the Capital, with my understanding of Section 15, Article IV, of the Constitution;

³⁴ *County of Yolo v. Colgan* (1901) 132 Cal. 265, 274-75.

³⁵ Assem. J. (1862 Reg. Sess.) pp. 118-19.

³⁶ Attorney General’s Opinion (Jan. 22, 1862) Assem. J. (1862 Reg. Sess.) pp. 120-25.

³⁷ As set forth above, all but the last clause of this provision remains in article IV, section 7 of the California Constitution.

in view of the absolute powers of the Legislature to control and direct their own movements; knowing that in the history of the past the Legislatures of several of the States have been temporarily removed, and on one occasion the National Capital has been driven by foreign invasion to seek safety for its members and its archives . . . I can come to no other conclusion than that the Legislature may, by concurrent resolution of a majority of both Houses, adjourn for more than three days, and to any place within the boundaries of this State”³⁸

This Attorney General opinion supports the position that temporary removal to another location is within the purview of the Legislature, and that deference should be given to its decisions to “control and direct” its own movements, particularly in an emergency when the move is temporary. It can be argued that legislating remotely in a manner that allows Members to interact in real time by both video and audio is, in substance, only a change in the location of a meeting and that the Legislature’s decision to do so during an emergency would be accorded deference.³⁹

In addition to the above, the temporary use of remote access under these circumstances may be upheld under the doctrine of substantial compliance:

“The rules governing the doctrine of substantial compliance are well settled. [Citation.] As it is used in the decisions of this state, the doctrine excuses literal noncompliance only when there has been ‘actual compliance in respect to the substance essential to every reasonable objective of the statute.’ [Citation.] Thus, the doctrine gives effect to our preference for substance over form, but it does not allow for an excuse to literal noncompliance in every situation. [Citation.]”⁴⁰

Here, it can be argued that by conducting sessions remotely for a limited period, the Legislature will have complied with the “substance essential to every reasonable objective of the statute.” As we have noted, the physical presence requirement is based on the principle that the give-and-take of debate is an essential element of the legislative process. Although physical

³⁸ Attorney General’s Opinion (Jan. 22, 1862) Assem. J. (1862 Reg. Sess.) pp. 122-123, 125, original italics.

³⁹ A court might similarly defer to the Legislature if it relied upon article IV, section 21 of the California Constitution to justify meeting remotely. That section provides: “To meet the needs resulting from war-caused or enemy-caused disaster in California, the Legislature may provide for: [¶] . . . [¶] . . . Convening the Legislature [¶] . . . [¶] [and] Selecting a temporary seat of state . . . government.” However, while it can be argued that a court would defer to an expansive legislative construction of this provision encompassing an emergency such as the present COVID-19 pandemic, we think it more likely that the specificity of the reference to “war-caused and enemy-caused disasters” would lead a court to limit the application of this provision to hostilities with “enemies” in the geopolitical sense, rather than biological pathogens.

⁴⁰ *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1430.

presence facilitates that give-and-take, the use of modern technologies allowing for both visual and auditory interaction in real time somewhat approximates being physically present. Thus, although legislating remotely would not comply with the form of the physical presence requirement, a court could find that it would comply with the substance of the requirement and, if used only in an emergency, would be substantially compliant.

However, while we concede that there are viable counterarguments and acknowledge that this matter is one on which reasonable minds may differ, we emphasize that legislating remotely goes to the very foundational question of whether the body is even properly assembled and configured to operate as it was designed to do under the Constitution and under the traditional understanding of how parliamentary bodies convene, deliberate, and legislate. Furthermore, it implicates the fundamental right of the public to directly observe, scrutinize, and give input into the legislative process. Given the gravity of those underlying concerns, we are simply not confident that a court would necessarily defer to the Legislature's apparent judgment that it is operating within constitutional parameters by legislating remotely. Therefore, we cannot counsel the Legislature to engage in remote legislating with a sense of security that such a practice would ultimately be upheld by the courts.

3. Conclusion

In our opinion, the California Constitution does not contemplate that Members of the Legislature may participate and vote in legislative proceedings, including floor sessions and committee hearings, by means of remote access.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel



By
Alyssa R. Kaplan
Deputy Legislative Counsel

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